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EMINENT DOMAIN: IN THE AFTERMATH OF *KELO V. NEW LONDON*, A RESURRECTION IN *NORWOOD*: ONE PUBLIC INTEREST ATTORNEY'S VIEW

PATRICIA H. LEE*

Too bad for Orlissie's Place, the Louisiana Southern Cuisine restaurant that used to be at 529 Lake St. [The] [o]wner . . . had financial problems and it didn't help when [the city and the local] High School moved to seize the property for creation of new athletic fields. . . . Orlissie's was family friendly. "Small orders of macaroni and cheese, meat loaf and fried catfish . . . bread pudding, and peach cobbler." We'll also miss the live jazz and blues on Friday nights.¹

INTRODUCTION

Three months before residents of New London, Connecticut, went to court in *Kelo v. City of New London*,² I recall reading a side note about a family distraught in a different town.³ The family-

* President and General Counsel, National Institute for Urban Entrepreneurship, Washington, D.C., and Maryland. The National Institute for Urban Entrepreneurship (NIUE) wrote an amici curiae brief to the U.S. Supreme Court in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005). See Welcome to NIUE, www.niueonline.org (last visited Dec. 26, 2006). The NIUE was joined by the Better Government Association, Citizen Advocacy Center, DKT Liberty Project, and the Office of the Community Lawyer. The NIUE, with the Ohio Conference of the NAACP, also filed a brief as amici curiae in *City of Norwood v. Gamble*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115. The NIUE is a non-profit, non-partisan corporation that develops and implements legal and entrepreneurship programs that support the growth of viable, sustainable businesses by Blacks, Latinos, and other entrepreneurs of color. Further, it strives to be a national catalyst for a culture of entrepreneurship, innovation, and private-sector economic growth in urban communities.

1. Eric Linden, *Villages Notice Increased Ridership on CTA El Lines*, Oak Park J. (Oak Park, Ill.), Aug. 7, 2000, <http://suburbanjournals.com/Stories99/DidYouKnow-past2.html> (quoting a *Chicago Magazine* review by Jeanne Rattenbury).

2. *Kelo v. City of New London (Kelo I)*, No. 557299, 2002 Conn. Super. LEXIS 789 (Conn. Super. Ct. Mar. 13, 2002), *aff'd in part, rev'd in part*, 843 A.2d 500 (2004), *aff'd*, 125 S. Ct. 2655 (2005).

3. Linden, *supra* note 1.

friendly restaurant named Orlissie's, located in Oak Park, Illinois, had succumbed to the *threat* of eminent domain. The unfortunate news of a restaurant closing was more common, partly because of the continued and disturbing increase in the number of eminent-domain acquisitions occurring across the country.⁴

As a public-interest attorney⁵ employed by one of the leading defenders of entrepreneurs, small businesses, and homeowners, and as former corporate counsel to a multinational corporation,⁶ I knew that this would not be the last time a business or homeowner would lose his or her property because of eminent domain. At the same time, I believed that this was yet another horrific example of a business owner losing the battle over developing property to run a business, in the manner and in the location he or she chose.⁷

Property owners, in dilemmas similar to that of the Oak Park business owner, are not typically in a position to successfully defend the taking of their private property.⁸ The cause is as much a function of the property owner's financial and political wherewithal to challenge⁹ even the *threat* of eminent domain, as it is the contempo-

4. See generally DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (2003), available at http://www.castlecoalition.org/pdf/report/ED_report.pdf. "Eminent domain . . . means the power to take land and the process for taking it. The only difference between condemnation and eminent domain is that the term condemnation is . . . broader. Eminent domain is not used to describe taking property that has numerous building code violations or tax delinquency." *Id.* at 219.

5. During the period of July 1998 through July 2003, Ms. Lee was employed by the Institute for Justice (IJ), a public interest law firm previously located in Washington, D.C., now with offices in Arlington, Virginia. IJ operates the IJ Clinic on Entrepreneurship at the University of Chicago, where Ms. Lee served as founding director from 1998-2002. From 2002-2003, Ms. Lee worked at IJ as Managing Vice-President and National Director of Clinical Programs.

6. From March 1984 to May 1994, Ms. Lee was corporate counsel for McDonald's Corp., a Dow 30 corporation with its United States headquarters in Oak Brook, Illinois.

7. BERLINER, *supra* note 4, at 2 (documenting "10,282+ filed or threatened condemnations for private parties[,] 3,722+ properties with condemnations filed for the benefit of private parties[,] 6,560+ properties threatened with condemnation for private parties[,] 4,032+ properties currently living under threat of private use condemnation[,] 41 states with reports of actual or threatened condemnations for private parties[, and] 9 states with no reports of either actual or threatened private use condemnations").

8. See Posting of James D. Carmine to Blogcritics.org, <http://blogcritics.org/archives/2005/09/21/185426.php> (Sept. 21, 2005) ("As Susette Kelo, painfully discovered, poor individuals are unable to afford the legal help necessary to win fair compensation from the mighty power of their local governments.").

9. Douglas W. Kmiec, *Foreword*, in BERLINER, *supra* note 4 ("The extent of this abuse is widespread, but until recently, largely unaddressed—in part because isolated landowners confronted with costly and cumbersome condemnation procedures seldom have the legal or political wherewithal to stand against the winds of power.").

rary presumption that eminent domain is, overall, beneficial. In most cases, rather than considering the constitutional nuances and factual distinctions in eminent-domain battles, the prevailing thought is simply to question whether the taking of the home or business owner's property would entitle the owner to "just compensation" and what amount of compensation a court would consider "just."

As unsettling as the Oak Park acquisition was to its community, as a matter of public policy, the taking of private property in order to give it to another private party seems more unthinkable and more egregious than the traditional taking for the benefit of the public in the form of schools, highways, common carriers, and roads.¹⁰ Perhaps predictably, polls evidence the widespread and negative public reaction to the United States Supreme Court's decision in the *Kelo* case.¹¹ Online opinion polls found that respondents overwhelmingly disapproved of the ruling.¹² The public's disapproval indicated that people believed the executive, legislative, and judicial branches had gone too far in allowing eminent-domain takings of private property without a traditional public use.

This essay discusses *Kelo*, the public outcry following the opinion, and the resultant legal action across the country. Part I reviews the history of the public use doctrine, while Part II discusses the Supreme Court's decision in *Kelo* and the Court's determination that economic development can be a public use. Part III discusses the executive, legislative, and voter responses to *Kelo*. Part IV discusses the case *City of Norwood v. Horney*, which was recently de-

10. Linden, *supra* note 1 (discussing the local public school's desire to use the Orliessie's Place site for expanded athletic fields).

11. *Kelo v. City of New London (Kelo III)*, 125 S. Ct. 2655, 2658 (2005); *see, e.g.*, Castle Coalition, Inst. for Justice, The Polls Are In: Americans Overwhelmingly Oppose Use of Eminent Domain for Private Gain [hereinafter "The Polls Are In"], http://castlecoalition.org/resources/kelo_polls.html (last visited Dec. 30, 2006) (discussion of the results of many public-opinion polls, and links to many of these polls); *see also infra* note 12 (discussion of several online polls that asked individuals questions about eminent domain takings).

12. *See, e.g.*, The Polls are In, *supra* note 11 (citing and discussing a number of Internet polls held to gauge the public support for eminent domain takings, including: CNN.com, QuickVote (click on the "Results" link) (reporting that 66 percent of survey participants selected "never" in response to the survey prompt: "Local governments should be able to seize homes and businesses"); MSNBC.com, Live Vote (click on the "Results" link) (reporting that 97 percent of respondents answered "No, property owners will lose and developers gain" to the survey prompt: "Should cities be allowed to seize homes and buildings for private projects as long as they benefit the public good?")).

cided by the Ohio Supreme Court.¹³ That opinion provides additional protection to the citizens of Ohio.¹⁴ Additionally, the decision provides a model for other state courts to follow when addressing state limitations on the use of eminent domain.

I. BACKGROUND

Examining the legal history on the public use doctrine reveals the cases of *Poletown Neighborhood Council v. City of Detroit*¹⁵ in the Supreme Court of Michigan and two prior U.S. Supreme Court cases—*Berman v. Parker*¹⁶ in 1954, and *Hawaii Housing Authority v. Midkiff*¹⁷ in 1984. These cases, called the “trifecta” of the public use doctrine,¹⁸ assured regulatory bodies that they could take private property for any number of purposes, creating a daunting hurdle for opponents of eminent-domain takings. Together, the trifecta created a presumption that when government entities take property, they do so for a public use, thereby creating a fait accompli for the acquisition and disposition of the private property even when there is no actual public use.¹⁹

Kelo v. City of New London was thought to be distinguishable, not only because of the manner in which the city would use the property, but also because of the legal concerns about the integrity of taking private property for private purposes, such as “economic development,” with remote, speculative, or indirect public uses.²⁰ The question presented was whether taking for “economic development” purposes alone withstands the constitutional scrutiny of the

13. *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115.

14. Prior to the court’s decision in *Norwood*, the Ohio legislature imposed a temporary moratorium on eminent domain takings for economic development. See *infra* note 44.

15. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

16. *Berman v. Parker*, 348 U.S. 26 (1954).

17. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

18. Adam Mossoff, *The Death of Poletown: The Future of Eminent Domain and Urban Development after County of Wayne v. Hathcock*, 2004 MICH. ST. L. REV. 837, 840.

19. The court creates this presumption by deferring to the legislature whenever there is any rationale for the taking because the taking would serve a public purpose. See, e.g., *Nat’l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 422-23 (1992) (following *Berman* and *Midkiff* and applying rational basis review to an Interstate Commerce Commission conclusion that a taking served a public purpose).

20. See Scott Bullock, *Narrow ‘Public Use’*, NAT’L L.J., Aug. 16, 2004, at 2 (on file with *Western New England Law Review*).

Fifth Amendment's Takings Clause.²¹

The outcome mattered because if private property could be taken for economic development, the meaning of property ownership had changed, raising the question whether home and business owners merely temporarily own property that they thought they permanently owned. Any further erosion of property rights might mean that a family's or individual's quiet enjoyment of their property had come to an end. In 2000, my greatest hope as a public-interest attorney was that the judiciary would critically review eminent domain and place real limits on its widespread abuse in light of the Fifth Amendment of the U.S. Constitution.²² I wondered whether *Kelo v. City of New London* would become a line in the sand protecting the property rights of businesses and homeowners.

With odds stacked against them, the *Kelo* plaintiffs brought suit in state court.²³ They did this in the shadow of the trifecta and the disturbing national and local confiscation trends, recognizing that most homeowners and businesses cave in under eminent-domain pressures. Overcoming the daunting feeling of a fait accompli, the petitioners courageously fought to keep their property.²⁴

The Connecticut trial court found that it was unreasonable for the City to take some of the properties and issued a permanent injunction as to those properties.²⁵ As to the other properties, the court did not find legal grounds for a permanent injunction preventing their condemnation,²⁶ but did find that there were enough unsettled legal issues to justify a temporary injunction during the appeal.²⁷ Both parties appealed and the Connecticut Supreme Court ruled that all of the properties could be taken by eminent

21. *Kelo v. City of New London (Kelo III)*, 125 S. Ct. 2655, 2658 (2005).

22. See U.S. CONST. amend. V.

23. *Kelo v. City of New London (Kelo I)*, No. 557299, 2002 Conn. Super. LEXIS 789 (Conn. Super. Ct. Mar. 13, 2002), *aff'd in part, rev'd in part*, 843 A.2d 500 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005).

24. See BERLINER, *supra* note 4, at 5. "For many people, the first time they hear the term 'eminent domain' is when they hear that someone is planning a shopping mall or condominium project and the location being talked about sounds suspiciously like their home." *Id.* The difficulty that individuals and businesses face if they choose to fight an eminent domain taking is daunting because there are far fewer public interest attorneys handling eminent domain cases compared to the number of private attorneys willing to represent owners in "just compensation" cases. *Id.*

25. *Kelo I*, 2002 Conn. Super. LEXIS 789, at *265. The plaintiffs' properties were in two different development parcels, 3 and 4A. *Id.* at *7. The court determined that the takings in parcel 4A were unreasonable and therefore dismissed the pending condemnation action. *Id.* at *265, *341.

26. *Id.* at *323-24.

27. *Id.* at *323-38.

domain.²⁸ The plaintiffs sought review by the United States Supreme Court, asking: “What protection does the Fifth Amendment’s public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of ‘economic development’ that will perhaps increase tax revenues and improve the local economy?”²⁹ In a five to four decision,³⁰ the Supreme Court failed to give the right answer to this important constitutional question.

II. THE SUPREME COURT DUCKS A SIMPLE AND IMPORTANT CONSTITUTIONAL QUESTION

Did the taking of Petitioners’ properties violate the public use limitation in the Fifth Amendment’s Takings Clause?³¹ In the National Institute for Urban Entrepreneurship’s amici curiae brief³² on behalf of the Petitioners, amici argued that eliminating the public-use limitation is contrary to the intent of the Constitution’s Framers. Property-rights advocates called upon the Supreme Court

28. *Kelo v. City of New London (Kelo II)*, 843 A.2d 500, 574 (Conn. 2004), *aff’d*, 125 S. Ct. 2655 (2005).

29. Brief of Petitioners, *Kelo v. City of New London (Kelo III)*, 125 S. Ct. 2655 (2005) (No. 04-108), at i.

30. *Kelo III*, 125 S. Ct. at 2655, 2658, 2665.

31. See generally CASTLE COALITION, INST. FOR JUSTICE, *Kelo v. City of New London: What it Means and the Need for Real Eminent Domain Reform 1* (2005) [hereinafter REAL EMINENT DOMAIN REFORM], available at http://www.castlecoalition.org/pdf/Kelo-White_Paper.pdf (“The Fifth Amendment to the U.S. Constitution states, ‘[n]or shall private property be taken for public use, without just compensation.’ Yet in the *Kelo* decision, Justice [John Paul] Stevens explains that the fact that property is taken from one person and immediately given to another does not ‘diminish[] the public character of the taking.’ The fact that the area where the homes sit will be leased to a private developer at \$1 per year for 99 years thus, according to the Court, has no relevance to whether the taking was for ‘public use.’ Instead, the *Kelo* decision imposes an essentially subjective test for whether a particular condemnation is for a public or private use: Courts are to examine whether the governing body was motivated by a desire to benefit a private party or concern for the public. Thus, because the New London city officials *intended* that the plan would benefit the city in the form of higher taxes and more jobs, the homes could be taken.”).

32. Brief of Amici Curiae, Better Gov’t Ass’n et al. in Support of Petitioners, at 3-4, *Kelo v. City of New London (Kelo III)*, 125 S. Ct. 2655 (2005) (No. 04-108). This brief was prepared by the Better Government Association, the Citizen Advocacy Center, the DKT Liberty Project, NIUE, and the Office of the Community Lawyer. NIUE became involved because both the destruction of urban small businesses and the targeting of minority neighborhoods evident in “economic development” takings was antithetical to NIUE’s mission. See *id.* at 2-3. While NIUE promotes economic development, it was quite concerned with the historical misuse of the tool of economic development to clear away unwanted people, styles of housing, and smaller enterprises and homes. This lack of inclusion in planning may have a deleterious effect on wealth building for some populations of persons of color. See *id.*

to revitalize the public-use limitation by holding that economic development *alone* is not a “public use” under the Fifth Amendment. Furthermore, amici argued that the decisions in *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff* “address[ed] extreme facts and d[id] not authorize takings for economic development alone, despite the unduly broad reading given them by local authorities and some courts.”³³ The summary of the argument is as follows:

In creating our nation, the Founding Fathers sought to ensure protection of the citizenry’s right to own property, something that the English sovereign had refused to do. Among the measures taken to protect these rights was the Fifth Amendment’s limitation on takings of private property for “public use” alone. This Court has long appreciated the importance of that limitation, making the Takings Clause the first provision of the Bill of Rights to be applied to the states through the operation of the Fourteenth Amendment. Modern social science has confirmed that the sanctity of property ownership is well justified, uncovering a host of hidden negative effects accompanying takings of private property on the health of the community, small businesses, and individuals.

Recently, however, local authorities have attacked the right of property ownership by engaging in widespread takings for the “public benefit” of “economic development.” In contrast to the words of the Framers, i.e., “public use,” authorities justify these takings by reference to speculative, often illusory, indirect public benefits of higher tax revenues and more jobs. These anticipated benefits, however, often are never realized, and almost always are counterbalanced by the hidden costs to the community associated with such takings. In addition, “economic development” is so broad a justification that it invites the wealthy and powerful to appropriate the eminent domain power for their own advantage and can be called upon to authorize takings of almost any land at any time, from anyone, inviting abuse by local authorities.

Courts often uphold these takings because they read this Court’s precedent as writing the Public Use limitation out of the Takings Clause of the Fifth Amendment. Such an interpretation is incorrect on the face of that precedent, i.e., *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) [E]liminating the Public Use limitation is directly contrary to the intent of the Framers. As such, this Court must revitalize the Public Use limitation by holding that

33. *Id.* at 4.

economic development alone is not a "public use" under the Fifth Amendment.³⁴

The majority in *Kelo* rejected the requests of Susette Kelo and eight other petitioners to save their homes and businesses from the bulldozer. Although not surprising that the judiciary might be reluctant to overturn a legislative decision or to reverse a state supreme court holding, it was disappointing and disturbing. Contrary to the reaction of some lawyers opining on the case,³⁵ my colleagues and I were astonished that the Supreme Court would actually duck answering the constitutional question before it. Without answering the constitutional question, the Supreme Court deferred the matter to the states.

The Supreme Court held that since the City's plan for the Fort Trumbull area "unquestionably serves a public purpose, the takings challenged here satisfies the public use requirement of the Fifth Amendment."³⁶ The Court explained that the City could not use eminent domain to take land for the benefit of a particular private party, but that it could take land as part of a "'carefully considered' development plan" so long as "the City's development plan was not adopted 'to benefit a particular class of identifiable individuals'" and the project served a public use.³⁷ Rather than define "public use" to mean use by the public, the Court construed the phrase so broadly that the phrase "public use" became synonymous with "public purpose."³⁸ The Court stressed that the City's determinations regarding its economic-development needs were entitled to deference.³⁹ Additionally, where a city has a comprehensive plan to promote economic development, as New London did in *Kelo*, any challenges must be weighed against the entire comprehensive plan, not isolated parts.⁴⁰ Finally, the Court dismissed both the proposal for a "bright-line rule that economic development does not

34. *Id.* at 3-4.

35. See, e.g., *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 106 (2005) (testimony of Thomas W. Merrill, Charles Keller Beekman Professor of Law, Columbia Univ. Law Sch.), available at <http://www.access.gpo.gov/congress/senate/pdf/109hrg/24723.pdf>.

36. *Kelo v. City of New London (Kelo III)*, 125 S. Ct. 2655, 2665 (2005).

37. *Id.* at 2661-62 (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984)).

38. *Id.* at 2662-63 (citing *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158-64 (1896)).

39. *Id.* at 2664.

40. *Id.* at 2665.

qualify as a public use”⁴¹ and the suggestion that if takings for economic development were to be permitted, courts “should require a ‘reasonable certainty’ that the expected public benefits will actually accrue.”⁴²

In a poignant white paper prepared for the Institute of Justice, Dana Berliner, one of the petitioners’ attorneys, summed up the Supreme Court’s decision in *Kelo*:

The Court ruled that 15 homes in the Fort Trumbull waterfront neighborhood of New London, Connecticut, could be condemned for “economic development.” There was no claim that the area was blighted. The project called for a luxury hotel, upscale condominiums, and office buildings to replace the homes and small businesses that had been there. The new development project would supposedly bring more tax revenue, jobs, and general economic wealth to the city. . . .

. . . .

So, according to the Supreme Court, cities can take property to give to a private developer with no idea what will go there and no guarantee of any public benefit.⁴³

A scary thought indeed.

III. THE AFTERMATH OF *KELO* WAS NO SURPRISE

Kelo created uproars in local, state, and federal legislatures, the federal executive branch, and some state judiciaries. Concerned citizens contacted their legislators to discuss eminent domain in their communities. Meanwhile, governmental and nongovernmental entities involved in the taking of properties through eminent domain were now in the position of reacting to the changed public opinion and some takings were stalled by moratoriums.⁴⁴ Individuals who were unaware that property could be taken

41. *Id.* at 2665-66.

42. *Id.* at 2667-68.

43. REAL EMINENT DOMAIN REFORM, *supra* note 31, at 1-2.

44. See, e.g., S.B. 167, 126th Gen. Assemb., Reg. Sess. (Ohio 2005), available at http://www.legislature.state.oh.us/BillText126/126_SB_167_I_Y.pdf (placing a state-wide moratorium through December 2006 on eminent domain for economic development purposes). The bill was signed into law by the governor on November 16, 2005. Ohio Legislative Serv. Comm’n, Senate Bill—Status Report of Legislation, 126th Gen. Assemb., <http://lsc.state.oh.us/coderev/sen126.nsf/Senate+Bill+Number/0167?OpenDocument> (last visited Dec. 30, 2006); see also Diane Plattner, *Creve Coeur City Council Approves Freeze on Some Eminent Domain Use*, ST. LOUIS POST-DISPATCH, Dec. 2, 2005, at D7, available at 2005 WLNR 19445347 (Westlaw) (discussing imposing a city-wide moratorium on the use of eminent domain for private development).

for economic-development reasons or to raise the tax base were surprised, appalled, and saddened by the decision. A level of community concern and public policy re-thinking, never seen before on the topic of eminent domain, caused a tidal wave of legislation, ballot initiatives, media inquiry, and community petitions in jurisdictions across the country.⁴⁵ Additionally, the judiciary in at least one state, Ohio, has fought back against the *Kelo* decision's erosion of property rights.⁴⁶

A. *Why the Uproar?*

As the U.S. Supreme Court was reading into the Constitution the words "public purpose,"⁴⁷ property rights advocates stared at the words "public use." The Supreme Court rejected a strict interpretation of the term, as though asking property rights advocates to avert their eyes.⁴⁸ The distinction has extraordinary legal implications for anyone involved in future eminent-domain actions. The federal courts' modest deference to legislatures and state court opinions signaled to the populace and opponents of eminent-domain abuse that the state and local legislatures and courts were proper venues to consider these important questions.

Regardless of the Supreme Court's decision, it still seemed un-American and against public policy to justify the taking of private property that would be given to another private party to increase the tax base. This unpopular decision has significant human, social, and economic ramifications. Ironically, a case that could have stood for hope to recognize the dream of business and home ownership instead stands as a harbinger of the death of property rights as we know them.

The human cost of eminent domain is real and needs to be quantified. Those who empathized with Susette Kelo and other petitioners, including the Derys and the Cristofaros, could only imagine the profound pain they experienced personally and privately throughout this ordeal.⁴⁹ Advocates of increased compensation do

45. See CASTLE COALITION, INST. FOR JUSTICE, LEGISLATIVE ACTION SINCE *Kelo* (2006) [hereinafter ACTION SINCE *Kelo*], available at <http://www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf>.

46. See *infra* Part IV.

47. *Kelo v. City of New London (Kelo III)*, 125 S. Ct. 2655, 2663 (2005).

48. *Id.* at 2661-62.

49. "'There's been an explosion of outrage by people across the country and across the political spectrum about what can be done,' says Scott Bullock of the Institute of Justice" and, contra, "Donald Borut, executive director of the National League of Cities, says . . . 'We all feel sympathetic for someone who is losing a home,' . . . 'But

not quite understand that many times it is not about the money. Sometimes, staying in one's home is a personal desire connected to conceptions of love, dignity, and respect. Other times, it is about the wish that the community's current racial, ethnic, and cultural diversity will be welcomed and included in the new, gentrified community. Though the Supreme Court did not weigh these intangibles, they were key to the settlements between the City of New London and Ms. Kelo, the Derys, and the Cristofaros that occurred within a year of the Court's decision.⁵⁰

On a societal level, the Supreme Court's failure to honor the Fifth Amendment is a blow to social and economic justice. The decision suggests that the federal judiciary is no longer the place for homeowners, small businesses, and other property owners to seek protection. Instead, individuals would have to seek change at the local and state level and in other branches of the federal government.⁵¹

B. *The Federal Executive and Legislative Response to Kelo v. City of New London*

After *Kelo*, two of the hottest words in Washington were "eminent domain."⁵² Members of Congress introduced a number of proposals to address the *Kelo* ruling.⁵³ On June 23, 2006, the one-year anniversary of the Supreme Court's decision in *Kelo*, President

we also have to consider the faces of people of all income levels who benefit from the job creation these projects bring.'" Dennis Cauchon, *States Eye Land Seizure Limits: Bills Would Rein in Eminent Domain*, USA TODAY, Feb. 20, 2006, at 1A, available at 2006 WLNR 3750021 (Westlaw).

50. Scott Bullock, *A Long Road: Susette Kelo Lost Her Rights, But She Will Keep Her Home*, LIBERTY & L., Aug. 2006, at 1, 10, available at http://www.ij.org/pdf_folder/liberty/15_8_06.pdf (summarizing the human toll and settlements in the aftermath of *Kelo*). Wilhelmina Dery passed away in March of 2006 in her home and her husband, Charles Dery, agreed to a settlement. *Id.* at 10. The Cristofaro family has an exclusive right to purchase, at a fixed price, one of the homes to be built in Fort Trumbull. *Id.* "Margherita Cristofaro, who passed away while the battle against eminent domain abuse occurred in New London," will be memorialized in a plaque that will be installed in Fort Trumbull. *Id.* "The City also has agreed to move the trees that father Pasquale Cristofaro transplanted 30 years ago" *Id.* Ms. Kelo's settlement was the acceptance of a proposal she presented years before, to keep her pink home and move it to a new neighborhood. *Id.* at 1.

51. Tresa Baldas, *States Ride Post-'Kelo' Wave of Legislation*, NAT'L L.J., Aug. 2, 2005, available at <http://www.law.com/jsp/article.jsp?id=1122899714395>.

52. See, e.g., Margie Hyslop, *State Lawmakers Join Eminent Domain Fight*, MONTGOMERY COUNTY GAZETTE (Gaithersburg, Md.), Aug. 16, 2005, available at http://gazette.net/gazette_archive/2005b/200532/montgomerycty/state/288539-1.html.

53. See *infra* text accompanying notes 58-64.

George W. Bush issued an executive order to restrict the seizure of private property solely to benefit private interests.⁵⁴ White House spokeswoman Dana Perino stated that “[t]he federal government is going to limit its own use of eminent domain so that it won’t be used for purely economic development purposes.”⁵⁵ The policy set out in the Executive Order permits the federal government to take property “for the purpose of benefiting the general public,” but not for “the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken.”⁵⁶ Although the Executive Order only limits takings by the federal government, it offers a clear rejection of the Supreme Court’s choice to apply the meaning of the broader phrase “public purpose” to the constitutional phrase “public use.”

By the time President Bush issued his executive order, members of Congress had been responding to *Kelo* for a year.⁵⁷ In the Senate, several bills intended to protect property owners from takings for economic-development purposes were introduced.⁵⁸ Senator Christopher “Kit” Bond responded to *Kelo* by offering an amendment⁵⁹ to the Transportation, Treasury, Housing and Urban Development, the Judiciary, District of Columbia, and Independent

54. Exec. Order No. 13,406, 71 Fed. Reg. 36,973 (June 28, 2006).

55. Jeremy Pelofsky, *Bush Moves to Limit US Gov’t Taking Private Land*, REUTERS NEWS, June 23, 2006 (quoting White House Spokeswoman Dana Perino), available at LEXIS (Reuters News database).

56. Exec. Order No. 13,406, 71 Fed. Reg. 36,973 (June 28, 2006).

57. See Castle Coalition, Inst. for Justice, Current Proposed Federal Legislation on Eminent Domain, <http://www.castlecoalition.org/legislation/federal/index.html> (last visited Dec. 30, 2006) (up-to-date listing of congressional actions in response to *Kelo*).

58. See, e.g., Protection of Homes, Small Businesses, and Private Property Act of 2005, S. 1313, 109th Cong. (2005) (stating that when federal funds are used, “the power of eminent domain shall be available only for public use,” and that “[t]he term ‘public use’ shall not be construed to include economic development”); Private Property Rights Protection Act of 2005, S. 1704, 109th Cong. (prohibiting the use of federal funds for eminent domain takings for economic development); Empowering More Property Owners with Enhanced Rights Act of 2005, S. 1883, 109th Cong. (creating Office of the Property Rights Ombudsperson and establishing a program to enhance the rights of, and provide advocates for, private property owners, small businesses, and family farmers affected by federal and federally assisted programs). S. 1313 was referred to the Judiciary Committee on June 27, 2005. 151 CONG. REC. S7429 (daily ed. June 27, 2005). In June of 2006, the measure had 31 co-sponsors in the Senate. 152 CONG. REC. S6449 (daily ed. June 23, 2006). S. 1704 was referred to the Judiciary Committee on September 14, 2005. 151 CONG. REC. S10,046 (daily ed. Sept. 14, 2005). S. 1883 was introduced and referred to the Committee on the Environment and Public Works on October 18, 2005. 151 CONG. REC. S11,479 (daily ed. Oct. 18, 2005).

59. 151 CONG. REC. S11,591 (daily ed. Oct. 19, 2005) (adding language permitting states and cities to use federal funds for projects that involve the exercise of eminent domain for a public use and barring the use of federal funds for any economic develop-

Agencies Appropriations Act for the 2006 fiscal year ending September 30, 2006.⁶⁰ Senator Bond's amendment was added to the act, eventually becoming law.⁶¹ Under the amendment, states and cities are allowed to use funds authorized by the Act for projects that involve the exercise of eminent domain for a public use, so long as the funds are not used for economic-development projects that primarily benefit private entities.⁶²

In addition to passing this bill, the U.S. House of Representatives considered a number of other bills and resolutions.⁶³ Just a week after the Supreme Court issued its decision in *Kelo*, the House approved a resolution expressing disagreement with the majority opinion in *Kelo*.⁶⁴ As in the Senate, much of the legislation introduced in the House sought to limit the use of eminent domain by cutting off federal funding for projects involving economic de-

ment project that primarily benefits private entities, proclaiming that such projects are not for a public use).

60. Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, H.R. 3058, 109th Cong. (2005) (as enrolled).

61. Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, 119 Stat. 2396 (2005).

62. *Id.* at 100-01.

63. See, e.g., Private Property Protection Act of 2005, H.R. 3135, 109th Cong. (2005) (as introduced by the House, June 30, 2005) (prohibiting the use of economic-development based eminent domain in any projects receiving federal funds and prohibiting the federal government from exercising eminent domain for economic development); H.R. 3315, 109th Cong. (2005) (as introduced by the House, July 14, 2005) (withholding community block grant funding from any locality where eminent domain may be exercised for commercial or economic-development purposes in such a way that taken property is transferred to a third party); Strengthening the Ownership of Private Property Act of 2005, H.R. 3405, 109th Cong. (2005) (as introduced by the House, July 22, 2005) ("A Bill [t]o prohibit the provision of Federal economic development assistance for any State or locality that uses the power of eminent domain power to obtain property for private commercial development or that fails to pay relocation costs to persons displaced by use of the power of eminent domain for economic development purposes."); Protect Our Homes Act of 2005, H.R. 4088, 109th Cong. (2005) (as introduced by the House, Oct. 19, 2005) (imposing limits on the use of eminent domain for purposes of economic development); H.R. Res. 340, 109th Cong. (2005) (as adopted in the House, June 30, 2005) (expressing disagreement with the majority opinion in *Kelo* and stating that "eminent domain should never be used to advantage one private party over another"); H.R.J. Res. 60, 109th Cong. (2005) (as introduced in the House, July 14, 2005) (proposing an amendment to the Constitution: "'Neither a state nor the United States may take private property for the purpose of transferring possession of, or control over, that property to another private person, except for a public conveyance or transportation project.'").

64. H.R. Res. 340, 109th Cong. (2005). Passed by the House on June 30, 2005, with 365 yays to 33 nays, with 18 answering "present," and 17 not voting. 151 CONG. REC. H5593 (daily ed. June 30, 2005).

velopment. Although no blanket prohibitions on Federal funding for projects involving eminent-domain takings for economic development have yet been adopted, the incorporation of Senator Bond's amendment to the Transportation, Treasury, Housing and Urban Development, the Judiciary, District of Columbia, and Independent Agencies Appropriations Act for the fiscal year ending September 30, 2006, indicates that many members of Congress do not want federal funds used for eminent domain takings that primarily benefit private parties.

C. *The State and Local Response to Kelo v. City of New London*

A plethora of bills were introduced before and enacted by state legislatures across the country after *Kelo*.⁶⁵ Immediately following the United States Supreme Court's 2005 *Kelo* decision, "legislatures in 28 states have introduced more than 70 bills aimed at curbing local eminent domain powers, and legislators in five states have proposed constitutional amendments to prohibit eminent domain for private development."⁶⁶ In a span of just fourteen months following the decision, thirty states successfully enacted new eminent-domain reform legislation.⁶⁷ Prior to *Kelo*, eight states—Arkansas, Florida, Illinois, Kentucky, Massachusetts, Montana, South Carolina, and Washington—had legislation forbidding the use of eminent domain for economic development purposes, except in cases involving blighted properties.⁶⁸ Three states—Alaska, Illinois, and Texas—have since enacted additional legislation further limiting the use of eminent domain.⁶⁹ In addition, legislators in six states—

65. See Castle Coalition, Inst. for Justice, State Legislative Actions, <http://maps.castlecoalition.org/legislation.html> (last visited Dec. 30, 2006) (giving an up-to-date listing of state actions in response to *Kelo*).

66. Carla T. Main, *How Eminent Domain Ran Amok*, POL'Y REV., Oct. & Nov. 2005, at 23, available at <http://www.policyreview.org/oct05/main.html> (citing data from a *National Law Journal* article from August 1, 2005 [sic]; see Baldas, *supra* note 51).

67. See ACTION SINCE *Kelo*, *supra* note 45, at 1.

68. CCIM INST., USE OF EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT: REACTION TO *Kelo* by State Legislatures 3 (2006), available at http://www.ccim.com/members/govaffairs/pdf/Eminent_Domain.pdf.

69. See H.B. 318, 24th Leg., 2d Sess. (Alaska 2006) (as enrolled) (prohibiting the use of eminent domain for economic development purposes and prohibiting the use of eminent domain to acquire a landowner's primary residence for the use of an indoor or outdoor recreation facility or project); Press Release, Castle Coalition, Inst. for Justice, Alaska Enacts Eminent Domain Reform (July 6, 2006), available at http://www.castlecoalition.org/media/releases/7_6_06pr.html (reporting that Alaska's Governor signed House Bill 318 into law on July 5, 2006 "in response to the U.S. Supreme Court's June 2005 decision in *Kelo*"); Equity in Eminent Domain Act, Ill. Pub. L. No. 094-1055

Florida, Georgia, Louisiana, Michigan, New Hampshire, and South Carolina—approved constitutional amendments to restrict the use of eminent domain, which have received voter approval.⁷⁰ In Arizona, Iowa, and New Mexico, governors vetoed eminent domain reform passed by the legislature.⁷¹ In Iowa, the legislature overrode the governor's veto to enact legislation that requires the government to prove by clear and convincing evidence that a property is blighted, or is in an area where 75 percent of property is blighted, before a property can be taken through condemnation.⁷² Eighteen states have not enacted any form of eminent-domain reform follow-

(2006), *available at* <http://www.ilga.gov/legislation/publicacts/94/PDF/094-1055.pdf> (imposing significant restrictions on the use of eminent domain); S.B. 7B, 79th Leg., 2d Sess. (Tex. 2005) (as enrolled) (restricting government or private entity from taking private property for primarily economic-development purposes, if purpose is pretextual, or if the taking confers a private benefit); 2005 TEX. SEN. J., 79th Leg. 2d Sess. 129 (daily ed. Aug. 19, 2005) (signed into law on Sept. 1, 2005); *see also* Castle Coalition, Inst. for Justice, Enacted Legislation Since Kelo, <http://www.castlecoalition.org/legislation/passed/index.html> (last visited Dec. 30, 2006) (discussion of state-enacted legislation following the U.S. Supreme Court's decision in *Kelo v. City of New London* (*Kelo III*), 125 S. Ct. 2655, 2663 (2005)).

70. ACTION SINCE *Kelo*, *supra* note 45, at 2; *see also* Press Release, Castle Coalition, Inst. for Justice, 2006 Election Wrap Up (Nov. 8, 2006), *available at* http://www.castlecoalition.org/media/releases/11_8_06pr.html; Castle Coalition, Inst. for Justice, 2006 Ballot Measures [hereinafter 2006 Ballot Measures], <http://www.castlecoalition.org/legislation/ballot-measures/index.html> (last visited Dec. 30, 2006); *cf. id.* (discussion of states that have passed legislation, based on citizen-initiatives, rather than legislator-initiatives, through ballot measures, including the state of Arizona).

71. Letter from Janet Napolitano, Governor, State of Ariz., to Jim Weiers, Speaker of the H., Ariz. H.R. (June 6, 2006), *available at* <http://www.azleg.state.az.us/govletttr/47leg/2R/HB2675.pdf> (Governor's explanation of her veto of H.B. 2675, which would have limited local control over redevelopment projects to regulate the use of eminent domain); 2006 IOWA SEN. J., 2006 Reg. Sess., 81st Gen. Assemb. 1764 (proof May 3, 2006) (printing Governor's veto message for H.F. 2351, which would have altered the state's condemnation powers and essentially prohibited the use of eminent domain for economic-development purposes); H.B. 746, 47th Leg., Reg. Sess. (N.M. 2006), *available at* http://legis.state.nm.us/lcs/_session.asp?chamber=H&type=++&number=746&Submit=Search&year=06 (last visited Dec. 30, 2006) (prohibiting the use of eminent domain to promote private or commercial development and the transfer of title to a private entity). Although the New Mexico legislature passed House Bill 746, Governor Richardson vetoed it, and called for a task force to examine eminent domain. Press Release, Castle Coalition, Inst. for Justice Legal Expert Testifies Before New Mexico Eminent Domain Task Forced [sic] (Aug. 11, 2006), *available at* http://www.castlecoalition.org/media/releases/8_11_06pr.html.

72. 2006 IOWA SEN. J., 2006 Reg. Sess., 81st Gen. Assemb. (proof July 14, 2006) (overriding Governor's veto of H.F. 2351, which altered the state's condemnation powers and essentially prohibited the use of eminent domain for economic development purposes); ACTION SINCE *Kelo*, *supra* note 45, at 6; *see also* Press Release, Iowa Legislature Overrides Eminent Domain Reform Veto (July 14, 2006), *available at* http://www.castlecoalition.org/media/releases/7_14_06pr.html.

ing *Kelo*, and of those states, three did not have legislative sessions in 2006.⁷³

Advocates of eminent domain reform should be careful in reviewing the legislation being proposed. State legislative amendments can address three aspects of the eminent-domain issue: (i) substantive restrictions on takings; (ii) procedural restrictions on the manner of taking; and (iii) compensation following a taking.⁷⁴ Advocates of private-property rights recommend legislation that “will genuinely protect citizens from losing their land to other private parties for private development.”⁷⁵ Obviously, neither increasing the amount of compensation due in takings cases nor imposing procedural restrictions will truly protect citizens. Therefore, reform efforts should focus on placing substantive restrictions on takings. Recommendations include removing statutory authorizations for the use of eminent domain in private commercial development, defining “blight” specifically, or requiring that the property be essential for the specific project.⁷⁶ The most effective legislative reforms are those that redefine blight because “[m]ost abuses of eminent domain for private use occur because a state’s definitions of blight are too broad or vague, applicable to practically every neighborhood in the country.”⁷⁷ Of the thirty states that have enacted eminent-domain reform, fourteen narrowed the definition of “blight,” making it difficult to classify a property as blighted, unless the property endangers public health or safety.⁷⁸ The other sixteen states enacted legislation providing some restrictions on the use of eminent domain for private development.⁷⁹

Local governments around the country also took action following *Kelo*.⁸⁰ For example, just three days after *Kelo* was decided,

73. ACTION SINCE *Kelo*, *supra* note 45, at 1.

74. Dwight H. Merriam, Presentation at the District 1 Conference of the Ass’n of Real Estate License Law Officials: *Kelo v. New London*, The Decision . . . and the Aftermath, 67-68 (June 26, 2006) (on file with *Western New England Law Review*).

75. REAL EMINENT DOMAIN REFORM, *supra* note 31, at 6.

76. *Id.* “Additional useful provisions [include having] blight designations expire after a certain number of years[, giving] owners the opportunity to rehabilitate property before it can be condemned[, and r]eturn[ing] property to former owners if it is not used for the purpose for which it was condemned.” *Id.* at 7.

77. ACTION SINCE *Kelo*, *supra* note 45, at 2.

78. *Id.*

79. *Id.*

80. See Castle Coalition, Inst. for Justice, Current Proposed Local Legislation on Eminent Domain [hereinafter “Current Proposed Local Legislation on Eminent Domain”], <http://www.castlecoalition.org/legislation/local/index.html> (last visited Dec. 30, 2006) (providing an up-to-date listing of proposed local legislation responding to *Kelo*).

county supervisors in San Diego, California, ordered an immediate review of the county's eminent-domain policies.⁸¹ In some cases, the local government's response was mostly symbolic, providing little or no additional protection for homeowners.⁸² A number of localities, however, took action to prevent the specific type of eminent domain abuse at issue in *Kelo*—the taking of private property for private development.⁸³ Other local efforts defined "public use" more narrowly than the Supreme Court, insisting that land be taken only for those projects actually available for the public's use.⁸⁴

In addition, citizens are taking action.⁸⁵ For example, "[o]n

81. *County May Limit Eminent Domain*, SAN DIEGO UNION-TRIB., July 20, 2005, at B2, available at <http://www.signonsandiego.com/news/metro/20050720-9999-7m20briefs.html>.

82. See, e.g., Bill Johnson, *Forsyth Commissioners Won't Take Land: Eminent Domain Ruled Out for Now*, ATLANTA J.-CONST., Aug. 11, 2005, at JH9, available at 2005 WLNR 12618175 (Westlaw) ("[T]he Forsyth County Commission unanimously passed a resolution that pledge[d] the current board [would] not" use eminent domain for economic development purposes. "The resolution, however, [was] not binding on future governing bodies.").

83. See, e.g., Plattner, *supra* note 44 (discussing a moratorium that Creve Coeur officials placed on the use of eminent domain for private development in November 2005); Current Proposed Local Legislation on Eminent Domain, *supra* note 80 (citing Sarah Thorson, *Q.C. Council Shuns Eminent Domain Use*, EAST VALLEY TRIB., Oct. 10, 2005) (discussing the fact that, in July, the Queen Creek town council approved, by unanimous vote, a resolution that prohibited the condemnation of private property for economic-development purposes); Rindi White, *Wasilla Bans Taking Private Land for Private Use*, ANCHORAGE DAILY NEWS, Nov. 2, 2005, at G4, available at 2005 WLNR 17729180 (Westlaw) (discussing the fact that the Anchorage Assembly unanimously voted to approve an ordinance that would prohibit the city from using eminent domain to benefit private developers).

84. Current Proposed Local Legislation on Eminent Domain, *supra* note 80 (citing Leslie Boyd, *Woodfin Decides to Restrict Eminent Domain*, ASHEVILLE CITIZEN-TIMES (Asheville, N.C.), Aug. 17, 2005, at 1B (reporting that the Woodfin Board of Aldermen approved by unanimous vote, a "resolution . . . stat[ing] that the board believes the Supreme Court's ruling in the case of *Kelo* vs. New London uses an 'overly broad definition' of public good." Moreover, the resolution "stat[ed] the town will not employ eminent domain outside of a true 'public use' context.")); Eric Stirgus, *Southsiders Vow: Hands Off; 2 Counties Opt to Limit Land Grabs*, ATLANTA J.-CONST., July 21, 2005, at 1C, available at 2005 WLNR 11418650 (Westlaw) ("Coweta and Henry county commissioners voted . . . to use the power of eminent domain solely for public purposes, such as building roads, fire stations, schools or libraries.").

85. See Castle Coalition, Inst. for Justice, Success Stories, <http://castlecoalition.org/success/index.html> (last visited Dec. 30, 2006) (providing a listing of local actions that have successfully prevented eminent domain takings). In addition to tracking eminent domain reform, the Castle Coalition, a project of the Institute for Justice, created an *Eminent Domain Abuse Survival Guide* to assist citizen-activists across the country. CASTLE COALITION, INST. FOR JUSTICE, EMINENT DOMAIN ABUSE SURVIVAL GUIDE: GRASSROOTS STRATEGIES FOR WINNING THE FIGHT AGAINST EMINENT DOMAIN

September 1, 2005, voters approved a referendum blocking Putnam [Connecticut] from using eminent domain to acquire private property for private economic-development purposes.”⁸⁶ In November 2005, voters in Bogota, New Jersey, passed an ordinance—by a vote of 1,408 to 293—prohibiting the mayor and borough council from using eminent domain to condemn private property for private development.⁸⁷ Voters have also led efforts to get eminent domain reform questions on ballots.⁸⁸

IV. THE OHIO SUPREME COURT’S RESPONSE TO *KELO*

At the same time as the Supreme Court’s decision in *Kelo* encouraged state and local legislators to impose additional limitations on the use of eminent domain, the Court suggested that some state constitutions and statutes might already provide greater protection than the U.S. Constitution.⁸⁹ Believing this to be the case, the National Institute for Urban Entrepreneurship joined the NAACP Ohio Conference in filing an amicus brief in the Ohio case of *City of Norwood v. Horney*.⁹⁰ In our amicus brief, we argued that: “The Burden of Eminent Domain Takings Fall Disproportionately Upon Racial And Ethnic Minorities and the Economically Disadvantaged” and “Redevelopment of Non-Blighted, ‘Deteriorating’ Neighborhoods Is Not a Public Use.”⁹¹

City of Norwood involved a plan by the City of Norwood to take private residences through eminent domain and turn the properties over to a private developer for a large, mixed-use development.⁹² Following an “urban renewal” study, the city labeled the

ABUSE, available at <http://castlecoalition.org/pdf/publications/survival-guide.pdf> (last visited Dec. 30, 2006).

86. Current Proposed Local Legislation on Eminent Domain, *supra* note 80 (citing *Voters Approve Limits on Eminent Domain*, NEWSDAY.COM, Sept. 2, 2005).

87. Current Proposed Local Legislation on Eminent Domain, *supra* note 80 (citing Brian Aberback, *Municipal Results; Bogota*, THE RECORD, Nov. 9, 2005, at L-4).

88. See, e.g., *Poll: Hands Off Private Land: Majority Banks Limits on Eminent Domain*, LAS VEGAS REV.-J., Oct. 28, 2005, at B1, available at http://www.reviewjournal.com/lvrj_home/2005/Oct-28-Fri-2005/news/4036616.html.

89. *Kelo v. City of New London (Kelo III)*, 125 S. Ct. 2655, 2668 (2005).

90. Brief Amicus Curiae of the Ohio Conf. of the NAACP and the Nat’l Inst. for Urban Entrepreneurship in Support of Appellants, *City of Norwood v. Horney*, *City of Norwood v. Gamble*, 110 Ohio St. 3d 353, 853 N.E.2d 1115 (2006) (Nos. 05-1210, 05-1211).

91. *Id.* at 2-17.

92. *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶¶ 8, 17-18. By the time the town took action to condemn the properties at issue in this case, the private developer had successfully acquired most of the other property required for the development. *Id.* at ¶¶ 19-21.

neighborhood a “deteriorating area.”⁹³ Thereafter, the city, in accordance with its ordinances, commenced actions to take the properties at issue in the case.⁹⁴

The trial court concluded that while the city’s urban renewal study was flawed, it was sufficient for the city to determine that the area was “deteriorating.”⁹⁵ Both the trial court and the appeals court refused to issue orders preventing the appropriation of the properties while the property owners appealed the trial court’s decision.⁹⁶ However, the Ohio Supreme Court did issue orders preventing the alteration or destruction of the properties pending the outcome of the appeal.⁹⁷

On July 26, 2006, the Ohio Supreme Court refused to uphold the two eminent domain actions, resurrecting property rights as citizens knew them prior to *Kelo*.⁹⁸ Writing for the Ohio Supreme Court, Justice Maureen O’Connor reversed the lower court, holding in part that “although economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of Section 19, Article 1 of the Ohio Constitution.”⁹⁹ A pleasant surprise indeed.

The court went on to apply “heightened scrutiny when reviewing statutes that regulate the use of eminent-domain powers.”¹⁰⁰ The court also rejected the use of “deteriorating area” as a standard for determining whether private property is subject to appropriation, saying it was void for vagueness and inherently speculative.¹⁰¹ Furthermore, the court severed from the statute, as unconstitutional, a provision that prohibited a court from preventing the taking and use of property appropriated by a government after compensation for the property had been deposited with the court, but prior to appellate review.¹⁰²

Public interest attorneys concerned about the rampant takings across the country were elated that the Ohio Supreme Court criti-

93. *Id.* at ¶ 22.

94. *Id.* ¶ 22, n.4.

95. *Id.* at ¶ 25.

96. *Id.* at ¶ 31.

97. *Id.*

98. *See id.* at ¶¶ 9-11.

99. *Id.* at ¶ 9.

100. *Id.* at ¶¶ 10, 66-74.

101. *Id.* at ¶¶ 88-104.

102. *Id.* at ¶ 11.

cally reviewed and decisively rejected provisions of this particular eminent domain statute. Ironically, the judiciary may yet be the branch that restores new life to the principle that constitutional limits do exist with respect to eminent domain. State courts that critically review state constitutions have struck the power balance between the proper use of eminent domain and protection of private property ownership. Hopefully, state high courts will embrace this opportunity to resurrect, at the state level, the constitutional protections tossed out by the Supreme Court.

CONCLUSION

Eminent domain has real, tangible, and adverse effects on entrepreneurs, small businesses, homeowners, and other property owners. The U.S. Supreme Court was presumed to be a place where those victimized by eminent domain abuse could find refuge. However, in *Kelo v. City of New London*, the U.S. Supreme Court was very clear: go to the legislature. Therefore, people have sought redress from their legislatures and other local venues, including state courts, to correct the misguided approach to eminent domain present across the country after the *Kelo* decision.

We heed the recommendation by the Supreme Court when it explained, "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."¹⁰³ The Supreme Court has indeed opened many eyes to an area of law that desperately needed reform; public interest lawyers are sure to respond.

103. *Kelo v. City of New London (Kelo III)*, 125 S. Ct. 2655, 2668 (2005).